Filed 9/29/03 In re Melissa M. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re MELISSA M. et al., Persons Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. ALFREDO E., Defendant and Appellant.	G032012 (Super. Ct. Nos. DP004224, DP004225) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Donna L. Crandall, Judge. Affirmed.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, and Mark R. Howe, Deputy County Counsel, for Plaintiff and Respondent.

Stephen S. Buckley, under appointment by the Court of Appeal, for the Minors.

* * *

Alfredo E. appeals from the judgment terminating his parental rights to daughter Melissa (born February 1997) and son Alfredo, Jr. (April 1998). He contends the juvenile court failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA), the evidence was insufficient to support the juvenile court's conclusion the children were likely to be adopted, and the court erred in not continuing the permanency hearing. For the reasons stated below, we affirm.

I

FACTS AND PROCEEDINGS IN THE JUVENILE COURT

Alfredo E. was incarcerated for narcotics violations in February 2000, when the Orange County Social Services Agency (SSA) took the children away from their mother, who had burned Alfredo, Jr., with a curling iron. Alfredo pleaded no contest to allegations he failed to protect the children. He failed to reunify with the children despite 18 months of services. Both children were placed in a prospective adoptive home in December 2002.[1] All parties except Alfredo stipulated to an order terminating parental rights. (Welf. & Inst. Code, § 366.26; all further statutory references are to this code, unless otherwise indicated.)[2]

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[1] This is the family's second visit to our court (see G030629). In November 2002, we accepted the parties' stipulation to reverse an order terminating parental rights as to Alfredo, Jr. At that time no adoptive home had been identified for the boy, who was on a faster permanency track than his sister because of his age. The hope was the siblings could be placed together in a permanent home.

[2] Alfredo was not present at the section 366.26 hearing. After her motion to continue was denied, trial counsel submitted on SSA's reports and declined to cross-examine the social worker. Counsel's notice of appeal indicates her client authorized this appeal.

II

DISCUSSION

Indian Child Welfare Act

A report prepared in advance of a March 2001 pretrial hearing cryptically notes ICWA "does or may apply." But the same report contains the mother's account "that the children were born in Orange County and are *not* of American Indian heritage." (Italics added.) The dependency petition forms do not indicate the children are of Indian ancestry (cf. Cal. Rules of Court, rule 1439(e)), and no one raised the issue in the juvenile court. Thus, Alfredo's claim that this phantom notation somehow triggered any duty of notification under ICWA is without merit. There was no reasonable basis to believe Melissa and Alfredo, Jr., were Indian children within the meaning of ICWA. (*In re O.K.* (2003) 106 Cal.App.4th 152.)

Children Likely to Be Adopted

Alfredo next challenges the sufficiency of the evidence to support the juvenile court's finding the children were likely to be adopted. He focuses on the children's past aggressive behavior towards their mother, temper tantrums and defiance with previous caregivers, past sexualized behavior, the recent failure of an adoptive placement, and SSA's recommendation the children would benefit from therapy. The argument is not persuasive.

Our review of the record confirms there was substantial evidence to support a finding it was likely the children would be adopted. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.) In our assessment of a sufficiency of the evidence claim, we must "presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) If any credible evidence supports the

juvenile court's order, we must uphold the finding. (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 424-425.)

At the time of the section 366.26 hearing, a new family had committed to adopt the children. Their expressed interest was persuasive evidence any emotional issues were not likely to dissuade other individuals from adopting these children. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650.) We also note the adoptions social worker felt each child was adoptable apart from the new caregivers' desire to adopt. His opinion finds support in the record; the children were healthy, young, developmentally on target for their ages, and able to function in a family setting. They had affectionately attached to their new caregivers, and referred to them as their parents. Tantrum behavior had subsided, as had Alfredo's problem with bedwetting. Substantial evidence supports the order terminating Alfredo's parental rights and freeing these children for adoption.

Section 366.26, Subdivision (c)(3)

Alfredo's final assertion, the court abused its discretion in refusing to continue the permanency hearing pursuant to section 366.26, subdivision (c)(3), also lacks merit. If the court determines adoption is probable but the child may be difficult to place, section 366.26, subdivision (c)(3), authorizes the court to "identify adoption as the permanent placement goal and without terminating parental rights, order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days." Here, neither child was "difficult to place for adoption," and there was an "identified or available prospective adoptive parent . . ."[3] The exception did not apply and there are no grounds for reversal.

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[3] The children's appellate counsel represented in his brief the children were thriving in their new environment. Alfredo's motion to strike this information is granted. (See *In re Zeth S.* (2003) 31 Cal.4th 396.)

Judgment affirmed.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.